IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.117 OF 1996

1. Shri Kashinath Jayaram Rakshe)

2. Shri Eknath Jayaram Rakshe,)
both at present in Yerawada)
Central Prison, Residing at)
Bahirwadi Village Chas Taluka)
Khed, District Pune.) ... Appellants
(Orig. Accused 1 and 3)

Versus

1. The State of Maharashtra)
Sessions Case No.14 of 1991)
Pune CR Nos.104 of 1989 of)
Khed Police Station, District)
Pune.

2. Laxmibai Supan Chavan,)

3. Bhimabai Mhaterba Chavan,)
both R/o. Papddwadi Tal. Khed,)
Dist. Pune.) ... Respondents

Mr. P.P. Hudlikar for the appellants.

Ms. M.M. Deshmukh, A.P.P. for the State.

Mr. U.B. Nighot for respondents 2 and 3.

CORAM : SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT RESERVED : 21ST AUGUST, 2007.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 5TH SEPTEMBER, 2007.

JUDGEMENT:-

1. The appellants are original accused 1 and 3 respectively. They were tried in the Court of Additional Sessions Judge, Pune in Sessions Case No.14 of 1991 along with three others for offences punishable under sections 147, 148, 302 read with section 149 of the Indian Penal Code (for short, “the IPC”).

2. At the trial, the case of the prosecution was that 1/10/1989 was a `*Gatari Aamavasya*'. Sopan Rambhau Chavan, Mhatarba Zambar Chavan and Maruti Baban Chavan had gone to the liquor shop of PW-4 Kamlakar Baburao Bhalerao sitauted at Bahirwadi, Thakarwadi to drink liquor. After having liquor, they started going to their house at Papalwadi. For going to Papalwadi, they had to pass by the road from Thakarwadi. The houses of the accused

and their relatives are situated on the said road. When they came near the house of the accused, Mhatarba Chavan and Sopan Chavan went to the house of the accused to drink water. According to the prosecution, the accused assaulted them with axe, iron bars, wooden piece (Lodhane) and sticks, due to which they sustained injuries and died on the spot. Thereafter, accused 1 along with Ganpat Rakshe and Narayan Rakshe went to a temple where a meeting of the villagers was to be held. They told the villagers that two dead bodies were lying in front of the house of accused 1. Maruti Rakshe, who was at the temple, came to the place of the incident. PW-2 Fulchand Kataria, the Police Patil of the village came to the place of incident after coming to know about the occurrence. He then went to the Khed Police Station and registered the case being Crime No.104 of 1989. Investigation was set into motion. After completion of the investigation, the accused came to be charged as aforesaid.

3. In support of its case, the prosecution examined nine witnesses. The prosecution heavily relied on the evidence of two

eye-witnesses i.e. PW-3 Ambudas Rakshe and PW-5 Maruti Chavan. The defence of the accused was one of denial. The accused claimed that they are falsely implicated. The accused examined DW-1 Dr. Laxman Wandekar as defence witness.

4. Having perused the evidence on record, the learned Sessions Judge acquitted accused 2, 4 and 5 of all the offences. He, however, convicted accused 1 and 3 for offence punishable under section 304 Part II of the IPC and sentenced them to suffer rigorous imprisonment for four years and to pay a fine of Rs.5,000/- each. In default of payment of fine, the accused are to suffer further rigorous imprisonment for one year each. Accused 1 and 3 are acquitted of rest of the offences. Being aggrieved by the said judgment and order, the appellants-accused have preferred this appeal.

5. I have heard Mr. Hudlikar, learned counsel appearing for the appellants, Ms. Deshmukh, the learned A.P.P. appearing for the State and Mr. Nighot, the learned counsel appearing for

respondents 2 and 3, the widows of Sopan Chavan and Mhatarba Chavan.

6. Mr. Hudlikar, the learned counsel appearing for the appellant contended that the learned Sessions Judge erred in placing reliance on the prosecution witnesses. He submitted that PW-3 Ambudas Rakshe has stated that he was sitting on the ota of his house. He has admitted that his eye sight is weak. He has also stated that there was no light in the vasti. It is, therefore, doubtful whether he had seen the accused assaulting the deceased. Moreover, in his cross-examination, he has stated that he cannot say who hit the deceased and with which weapon they hit the deceased. Mr. Hudlikar submitted that therefore the evidence of this witness cannot be relied upon. Mr. Hudlikar submitted that similarly PW-5 Maruti Chavan is also not a reliable witness. He submitted that it is apparent from the evidence of PW-5 Maruti Chavan that he has suppressed the cause of the incident. It was, therefore, wrong to rely on the evidence of this witness. Mr.

Hudlikar further submitted that the discovery of weapons at the instance of accused 1 does not inspire confidence. He submitted that PW-6 Gajanan Shinde, the pancha witness has stated that the statement of the accused leading to discovery was written as stated by the PSI. Therefore, the panchnama is a concocted document and it must be rejected. Mr. Hudlikar submitted that if recovery of weapons and blood stained clothes is disbelieved then the finding of blood stains on the weapons and clothes cannot be taken as a circumstance against the accused. Mr. Hudlikar submitted that the prosecution has not been able to prove motive. He submitted that it was not open for the learned Judge to observe that motive was not proved and then go on to find out the possible cause for the incident in question. Mr. Hudlikar submitted that the learned Judge has acquitted three of the five accused. He has not believed the prosecution story so far as the involvement of three accused is concerned. Therefore, it is risky to rely on the prosecution evidence to come to a conclusion that the involvement of accused 1 and 3 is established.

7. Mr. Hudlikar submitted that the learned judge has observed that there is discrepancy about the place where the incident had taken place. He has stated that there is some variance as to the exact place where the dead bodies were lying and that the map has not been prepared immediately. He has also observed that the map had been drawn wrongly. Mr. Hudlikar submitted that this casts a shadow of doubt on the investigation and the benefit thereof must go to the accused. He submitted that in the circumstances, the conviction and sentence of the accused be set aside.

8. As against this, Ms. Deshmukh, the learned A.P.P. submitted that no interference is necessary with the impugned order. She submitted that the evidence of eye witness PW-5 Maruti Chavan inspires confidence. It is supported by the evidence of PW-3 Ambudas Rakshe and PW-4 Kamlakar Bhalerao. The learned A.P.P. submitted that the finding of weapons and blood stained clothes at the instance of accused 1 is a clinching circumstance. She submitted that there is enough evidence on record to establish

that Mhatarba Chavan and Sopan were attacked by the accused and they succumbed to death due to the injuries suffered by them. The learned A.P.P. submitted that, therefore, the conviction and sentence of the accused is justified.

9. Investigation of this case was started on the basis of the complaint lodged by police patil PW-2 Phulchand Kataria. He has stated that at the relevant time, he was the police patil of Village Chas. On 2/8/1989, at about 1.00 a.m., one Chindhu Sadashiv Shinde of Papalwadi came to him and told him that Sopan and Mhatarba Chavan are lying dead near the house of accused 2 Jayram Rakshe. He went to the scene of offence. After ascertaining the fact that the bodies of Sopan and Mhatarba Chavan were lying near the house of accused 2, he went to Khed Police Station. At the Khed Police Station, his complaint was recorded, which is at Ex-26.

10. According to the prosecution, the incident in question had

taken place on a *Gatari Aamavasya*. PW-4 Kamlakar Bhalerao has stated that he used to sell illicit liquor in Thakarvasti in his house and some times deceased Sopan and Mhatarba Chavan used to come to his house. He has stated that on the day of incident, both of them and PW-5 Maruti Chavan came to his house for drinking liquor. They drank liquor in his house and left his house at about 7.30 p.m. to 8.00 p.m. Evidence of PW-4 Kamlakar Bhalerao is not challenged in the cross-examination.

11. PW-5 Maruti Chavan has stated that he knew deceased Sopan and Mhatarba Chavan. They were his relatives. He has stated that all of them reside at Papalwadi. According to him, Thakarwadi is about 3 Kms. away from Papalwadi and, sometimes, they used to go there to drink liquor. He has submitted that 1/8/1989 was a *Gatari Aamavasya* and, hence, he along with the deceased went the house of PW-4 Kamlakar Bhalerao at Thakarwadi to drink liquor. They drank liquor in the house of PW-4 Kamlakar Bhalerao. Thereafter, they started going to Papalwadi.

As they were passing by the house of accused 2 Jayram Rakshe, the deceased told him that they wanted to drink water. The deceased went to the house of accused 2 Jayram Rakshe. He stood on the road waiting for them. According to PW-5 Maruti Chavan, accused 1, 2 and 3 came out. Accused 1 was having a wooden piece called Lodhane in his hand. Accused 2 was having an iron bar in his hand and accused 3 was having an axe in his hand. They went near the deceased. There was exchange of words. By the time, accused 4 and 5 also came there. They had sticks in their hands. All the accused started beating the deceased with the weapons in their hands. Within few minutes, the deceased fell on the ground. According to PW-5 Maruti Chavan, at that time, the electric light on the pole was on and, therefore, there was light in and outside the house of the accused. He has stated that he was frightened and, therefore, he went to his house. In the morning, police came to his house. He narrated the incident to the police. In the court, he identified the accused as persons who had assaulted the deceased. When wooden piece Lodhane (article 18), axe (article 16) and iron bar (article 17) were shown to him, he

identified them as the same weapons with which the deceased were assaulted.

12. He has been cross-examined at length. Certain omissions have been brought on record in his cross-examination. It appears that he had not told the police that after going to the house of accused 2 Jayram Rakshe, the deceased started talking loudly. He had not told the police that the deceased told him that they wanted to drink water and, therefore, they went to the house of the accused. It appears that in his police statement, he had stated that after entering the house of the accused, deceased Mhatarba Chavan had held the hand of his daughter Kamlabai. However, in his evidence before the court, he has not stated so. He has also tried to assign roles to Sonabai and Kamalabai, accused 4 and 5 respectively. However, in his police statement, he has not specifically stated that these accused were having sticks in their hands. In my opinion, these improvements and omissions will have no effect on the basic story narrated by him about the attack on the deceased. As I have already stated, the evidence of PW-4

Kamlakar Bhalerao supports the case of the prosecution that PW-5 Maruti Chavan was with the deceased on the day of the incident. All of them had liquor in the house of PW-4 Kamlakar Bhalerao and while they were returning to their house, on the way, they appeared to have entered the house of the accused. PW-5 Maruti Chavan's evidence that accused 1 and 3 had wooden piece called Lodhane (article 18) and axe (article 16) respectively in their hands and they hit the deceased has remained intact in the cross-examination and is also supported by other evidence on record to which I will soon advert. This witness, the deceased and the accused knew each other. According to this witness, he was standing about 15 feet away from the house of the accused. The accused came out and started assaulting the deceased. He witnessed the assault. Since, he knew the accused, there can be no question of mistaken identity. His identification of the accused as the assailants of the deceased cannot be questioned. I find no reason to disbelieve his evidence.

13. At this stage, reference may also be made to the evidence of

PW-3 Ambudas Rakshe. PW-3 Ambudas Rakshe knows all the accused. He also knew the deceased. He has stated that the uncle of accused 1 resides near his house. He has stated that on the day of incident at about 8.00 p.m., he was sitting on the ota of his house. According to him, two persons came from Thakarwadi and went to the house of accused 2 Jaram Rakshe. He has further stated that the accused started hitting those two persons. From the evidence of this witness, it can be gathered that some incident did take place in which the accused hit two persons. To this extent, the prosecution can draw support from the evidence of PW-3 Ambudas Rakshe. If the prosecution wanted to concoct the evidence, it was easy for the prosecution to ask PW-3 Ambudas Rakshe to say that he had seen the accused hitting the deceased because this witness claims to know the deceased. But this witness has not stated so. He has stated exactly what he had seen. He has honestly stated that he has a weak eye sight. This witness has not tried to exaggerate the prosecution case. The evidence of this witness supports the prosecution story that, at the relevant time, the accused who were violent had attacked two

persons.

14. According to the prosecution, on 6/8/1989, accused 1 Kashinath Rakshe made a statement that he will show the weapons and clothes which he had kept in his house. According to the prosecution, this statement of accused 1 was recorded. The memorandum to this effect is at Ex-33. Accordingly, accused 1 led them to Bahirwadi where his house is situated. He took them inside the house and showed them an axe, wooden piece called Lodhane and an iron bar kept under the potmala in a tarpoline. He also took out a bag containing some clothes. In the bag, there was a towel, kopati and payjama. There were blood stains on the clothes and on the weapons. Panchnama was drawn, which is at Ex-34.

15. PW-6 Gajanan Shinde is the pancha to the said panchnama. He has supported the prosecution. He has stated that all the clothes were wrapped in separate papers. He has denied the suggestion that the clothes and weapons were not attached

before him. There is no serious challenge to the seizure and sealing of the articles in the cross-examination. It is argued that this witness has stated in the cross-examination that the statement of accused 1 was written as stated by PSI Narhari Jadhav and, therefore, it is a concocted statement. In the examination in chief, PW-6 Gajanan Shinde has stated that accused 1 had stated that he would show the weapons and clothes which he had kept in his house. The police recorded his statement and he and other panchas signed on it. He has identified the signature. He had stated that the contents of the panchnama are correct. No doubt, in the cross-examination, he has stated that it took about 15 minutes to record the statement of the accused and the statement was recorded as stated by the PSI. From this, it cannot be concluded that it is the PSI who prepared the statement. His statement in the cross-examination will have to be read against the background of what he has stated in his examination in chief. Obviously, when accused 1 made a statement that he would show the clothes and weapons, it is the PSI who had directed it's recording. It is in this context that this witness has stated that this

statement was written as stated by the PSI. It is not possible to draw an inference that it is the PSI who concocted and wrote this statement.

16. Discovery of clothes and weapons at the instance of accused 1 is also supported by the evidence of PW-9 PSI Narhari Jadhav. He has stated that the clothes and weapons were stained with blood. They were attached and sealed. This fact is also stated in the panchnama. The said discovery, therefore, inspires confidence.

17. PW-8 Dr. Hemant Satarkar had done the postmortem on deceased Sopan. He has given cause of death of the deceased as "traumatic shock due to multiple head and facial injury". External injury No.1 and internal injury No.2 received by deceased Sopan are as under :

> "External Injury No.1:
>
> 1. C.L.W. 1" x 1" by 1" deep. Two inch above left eye. Frontal bone with brain matter exposed with the wound.

Internal Injury No.2:

2. Communicated fracture of left temporal bone broken into pieces."

PW-8 Dr. Hemant Satarkar has stated that external injury No.1 corresponding to internal injury No.2 might have been caused by sharp object like axe. When article 16 (axe) was shown to him, he has stated that it can cause the said injury. External injury No.2 and internal injury Nos.1 and 3 are as under :

"External Injury No.2 :

2. Lacerating injury measuring 5" x 1" and deep to brain with multipal pieces of bone across the forehead.

Internal Injury Nos.1 & 3:

1. Hamemtoe under right temporal scalp. Crushed fracture of left frontal bone.

3. Depressed fracture of right frontal bone. Laceration of frontal and temporal lobes of brain."

When the wooden piece, Lodhane (article 18) was shown to

him, Dr. Satarkar has stated that external injury No.2 which corresponds to internal injury Nos.1 and 3 can be caused by hard and blunt object like Lodhane (article 18). External injury No.3 is as under :

> "External Injury No.3 :
>
> 3. C.L.W. at left chin measuring 1½ x ½" x 1 inch deep to bone fracture of mandible left side."

When iron bar (article 18) was shown to him, Dr. Hemant Satarkar has stated that external injury No.3 can be caused by the said iron bar (article 18).

18. On deceased Mhatarba Chavan, PW-8 Dr, Hemant Satarkar found the following external injury No.1.

> "External Injury No.1:
>
> C.L.W. 3" x 1½" x 1" deep to bone above left eyebrow."

He found the following internal injuries being injuries Nos.1, 2 and 3 on the corpse of Mhatarba Chavan.

"Internal Injury Nos.1, 2 and 3:

1. Fracture of nosal bone.

2. Fracture of mandle bone.

3. Upper left albiler bone fracture."

When wooden piece Lodhane (article 18) was shown to him, he has stated that these injuries can be caused by Lodhane (article 18). He also found following external injury No.5 on the deceased.

"External Injury No.5 :

Tear of left external pinna of the ear."

He has stated that this injury can be caused by a sharp article like axe. When article 16 was shown to him, he has stated that the said injury can be caused by article 16. PW-8 Dr. Hemant Satarkar noted the following external injury No.6 on deceased Mhatarba

Chavan.

"External Injury No.6 :

6. Multiple contusion of both lower legs."

When iron bar (article 17) was shown to him, he has stated that external injury No.6 must have been caused by the said article. The defence has not been able to bring on record anything by cross-examining this witness to suggest that the evidence of this witness cannot be accepted. Therefore, it can be concluded that article Nos.16, 17 and 18 were used to attack the deceased.

19. According to the prosecution, accused 2 had an iron bar in his hand. Relying on the evidence of DW-1 Dr. Laxman Anant Wandekar and the evidence of PW-7 Maruti Rakshe, who were asked to stay to look after accused 2, the learned Judge has held that accused 2 must be given benefit of this evidence and it must be held that accused 2 was not fit to assault anybody. Therefore, discovery of iron bar though proved, cannot be taken against him.

It cannot be said that it was he who used the iron bar. But so far as Lodhane and axe are concerned, it is proved that they were used by accused 1 and 3 respectively.

20. It appears that there is some discrepancy as regards the exact place where the dead bodies were found. The panchnamas and the panch witnesses say that the incident took place at a distance of about 75 feet from the house of the accused. The map of the place of incident states that it is 125 feet away and on the other side of the road and PW-5 Maruti Chavan has stated that the incident took place at a distance of about 10 feet away from the house of the accused. Not much importance can be attached to this variation in distance. Map obviously has not been correctly drawn as stated by the learned Judge. The learned Judge has rightly observed that some exchange of words took place between the accused and the deceased. The accused, thereafter assaulted the deceased. It is inconceivable that the accused and deceased would have stood at the same place. They surely must have moved around. Therefore, the estimate of distance given by each

witness will obviously vary. The fact is that the dead bodies were found near the house of the accused. Variance in the distance cannot be taken against the prosecution in the present case. Besides benefit of faulty investigation must not be allowed to go the accused if the prosecution case is otherwise borne out by the evidence on record. (See ***Karnel Singh v. State of M.P., AIR 1995 SC 2472.***)

21. It is pertinent to note that the chemical analyser's report (Ex-45) shows that on the weapons and on the clothes recovered at the instance of accused 1, human blood was found. The blood found on wooden piece Lodhane (article 18), clothes and bandi (article 20) was of “A” group. The blood found on pyjama (article 22) was of “A” as well as “B” group. The blood found on the axe (article 16) and iron bar (article 17) was of “A” group as well as “B” group. The blood detected on the towel was of “A” group as well as “B” group. The chemical analyser's report shows that the blood group of all the accused is “A”. It is not the case of the accused and there is nothing to establish that the accused had sustained any injuries

prior to the incident or during the incident. Therefore, the possibility of the blood found on the clothes and weapons being that of the deceased cannot be ruled out. This is a clinching circumstance against accused 1 and 3.

22. It is true that the real cause of the incident has not come on record but it appears from the evidence of PW-5 Maruti Chavan that there was some exchange of words between the accused and the deceased. Thereafter, the accused started hitting the deceased. PW-5 Maruti Chavan has stated that prior to this incident the relationship between the deceased and the accused was not bad. It appears that some incident did took place after the deceased entered the house of the accused, which angered the accused and, therefore, they attacked the deceased. Intention to murder the deceased, therefore, cannot be attributed to accused 1 and 3. The learned Judge has, therefore, rightly convicted accused 1 and 3 for offences under section 304 Part II of the Indian Penal Code and sentenced them to four years Rigorous Imprisonment and to pay a fine of Rs.5,000/- each in default of

payment of fine, to suffer further rigorous imprisonment for one year. The amount of fine, if realised, has to be distributed in equal proportion to the wife and the children of the deceased. In my opinion, for the reasons aforestated, the conviction and sentence of the accused is justified and no interference is necessary with it. There is no merit in the appeal. The appeal is dismissed. The accused are on bail. They shall surrender to the bail forthwith.

[SMT. RANJANA DESAI, J.]